(2)

No. 89-371

In The

Supreme Court of the United States

October Term, 1989

AMERICAN STEAMSHIP COMPANY,
Petitioner,
vs.
ALI MUSLEH,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDICES –

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COUNTER-QUESTION PRESENTED FOR REVIEW

DOES THE ISSUE PRESENTED BY PETITIONER COMPORT WITH THE REQUIREMENTS OF SUPREME COURT RULE 17.1(a)-(c), INCLUSIVE, SO AS TO JUSTIFY A REVIEW OF LOWER COURT DECISIONS PURSUANT TO A WRIT OF CERTIORARI?

PARTIES TO THE PROCEEDINGS BELOW

Respondent is Ali Musleh.

Petitioner is American Steamship Company, a New York corporation. Petitioner is a wholly-owned subsidiary of GATX Corporation, a New York corporation.

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Respondent, Ali Musleh, respectfully requests that a Writ of Certiorari not issue and that the decision of the United States Court of Appeals for the Sixth Circuit be allowed to stand in this case.

OPINIONS AND ORDERS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit (decided June 23, 1989), affirming the judgment entered in the District Court, has already been reproduced as Petitioner's Appendix A. The Order denying the motion for judgment notwithstanding the verdict (February 2, 1988) has already been reproduced as Petitioner's Appendix B. The judgment of the District Court (October 5, 1987) has already been reproduced as Petitioner's Appendix C.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on June 23, 1989. Petitioner states that the Petition for Writ of Certiorari was filed within ninety (90) days of that day. Petitioner invokes jurisdiction of the Supreme Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the following statutes which are set out verbatim in Appendix A:

1) 46 U.S.C. § 688, the Jones Act;

2) 28 U.S.C. § 1916, permitting a seaman to proceed with this Brief in Opposition without prepayment of fees or costs or funishing security therefor under Supreme Court Rule 47.

COUNTER-STATEMENT OF THE CASE

(References in parentheses are to District Court docket entries, trial transcripts and trial exhibits)

Respondent began his sailing career in 1966. He first sailed with the Petitioner in 1968 (Plaintiff's Exhibit 15; hereafter "PE" will denote "Plaintiff's Exhibit").

In 1985, the most recent year to employ as a benchmark for calculating an award for lost future wages, hence the most reasonable benchmark for making such an award, Respondent's gross earnings were $33,281.00 (PE 4). This included $4,874.25 vacation pay (PE 2) and $10,892.96 he earned while in the Petitioner's employ (PE 3). He worked for numerous other maritime employers in 1985 (PE 1).

In 1984, Respondent earned $6,827.56 while employed by the Petitioner; in 1983, $15,102.51; in 1982, $17,974.16; and, in 1981, $24,087.00 (PE 3).

On October 17, 1985, Respondent boarded the Petitioner's vessel for the first time with the rank of second cook (PE 15). Four days later, on October 21, 1985, Respondent suffered his injury (Transcript, September 25, 1987, p. 63; Trial Transcript, consisting of 6 volumes, will be designated hereafter with reference to the date of the transcript volume and page number as follows — "25th, 63"). A second cook's job assignments include putting groceries ("stores") into storage aboard the vessel (25th, 47-48). This activity includes storing milk which comes in ten- to twenty-container crates (Murphy Deposition, p. 5), which are made of plastic or steel (29th, 33). The milk crates weigh between forty and fifty pounds (29th, 63, 80).

Respondent testified that he was injured when a twelve-gallon crate struck him as he was attempting to put the stores away (25th, 51).

The Petitioner's own witness, Brendan P. Murphy, testified that full crates were moved across the galley by either sliding them on the galley floor or by carrying them (Murphy Deposition, p. 7). While Respondent had seen empty crates slid across the floor on other vessels (25th, 101), he had never seen full crates used in this manner (25th, 65). No witnesses contradicted Respondent's testimony on this point.

On the date of Respondent's injury, he, deckhand Peter McCabe, porter Brendan Murphy, and their boss, steward Ron Pokorney (25th, 18), were working in the galley (29th, 27).

Petitioner's Accident Report describes Respondent's accident as follows:

> "Crew member was putting milk (stores coming aboard) in the refer when Peter McCabe slid a full case of milk across the floor and hit Ali A. Musleh in the lower part of his l. leg (calf)." (PE 7)

Respondent testified that the latter method — carrying the crates — described by the Petitioner's witness McCabe, was being used prior to the time he was struck by the sliding crate. Respondent testified that he had told deckhand McCabe to leave the milk crates sitting outside the galley door (29th, 89) and he would carry it across the galley himself when ready (25th, 23, 25, 52). Respondent further testified that he did not see the crate before it struck him (25th, 15) nor did he know it was coming (25th, 23).

The distance between McCabe and Respondent was between seven and twelve feet (25th, 50; 29th, 77). McCabe admitted that he did not shout a warning before he slid the crate across the tile floor or otherwise communicate with Respondent prior to sliding the crate (29th, 88).

Upon being struck hard in the left leg by the crate (25th, 14, 29), Respondent twisted his back (25th, 13, 15, 75-76) and caught himself on the refrigerator ("refer") (25th, 13, 62). Medical records disclose that Respondent suffered severe pain as a result of the back injury which manifested itself several days later.

FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

Federal jurisdiction in the court of first instance was invoked under 46 U.S.C. § 688 (Jones Act) and the General Admiralty and Maritime Laws of the United States under 28 U.S.C. § 1333.

REASONS FOR DISALLOWANCE OF THE WRIT

Supreme Court Rule 17.1(a)-(c), inclusive, specifically addresses the circumstances under which a petitioner may seek review of an appellate decision by means of a Writ of Certiorari. Petitioner's Petition does not comply with said Rule; it merely asks this Court to review a fact dispute which was previously decided by a jury and upheld by two inferior Courts as not being so disproportionate to the testimony presented at trial as to shock the judicial conscience.

A. Non-Compliance With Requirements Of Supreme Court Rule 17.1(a)-(c), Inclusive

Supreme Court Rule 17 provides in relevant part:

> "A review on writ of certiorari is not a matter of right, but of *judicial discretion, and will be granted only when there are special and important reasons therefor.* The following * * * indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; * * * ; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of * * * a federal court of appeals.

> (c) When a * * * federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." [Emphasis supplied].

The standard for review under the above criteria has been discussed in *Fields* v. *United States*, 205 U.S. 292, 27 S.Ct. 543, 51 L.Ed. 807 (1907). The *Fields* Court held that certiorari to review a judgment of the court of appeals, even in a criminal case, will not be granted, however important the issue may be to the petitioner, where it does not involve a question of gravity or of general importance, there is no conflict between state and federal court decisions or between those of federal appeals courts of different circuits, and nothing involved affects international relations.

None of the criteria set forth in Supreme Court Rule 17, and discussed in *Fields*, has been, even remotely, established by the Petitioner. No conflict between the Sixth Circuit Court of Appeals and other federal appellate courts exists with respect to the issues raised and decided in the lower court proceedings; the decision by the Sixth Circuit does not evidence the "far departure from accepted judicial practice" which would warrant this Court's power of supervision. Obviously, a state court decision is not involved. Moreover, the Sixth Circuit decision merely analyzed a fact situation under legal principles which have been previously established by American jurisprudence; it does not conflict with any applicable decisions of this Court.

The Petitioner's framing of the issue merely disguises the true nature of the instant dispute through creative draftsmanship; it is a surreptitious attempt to have this

Court review the facts for a fourth time, having already been fully reviewed below by the jury, District Court and a panel of the Sixth Circuit.

This Court has already decided that jurisdiction to review judgments of federal courts of appeal by certiorari is to be exercised *sparingly* and only in cases of gravity and general importance, or in order to secure uniformity of decisions. *Re Lau Ou Bew*, 141 U.S. 583, 12 S.Ct. 43, 35 L.Ed. 868 (1891); *Re Woods*, 143 U.S. 202, 12 S.Ct. 417, 36 L.Ed. 125 (1892). The issue phrased by the Petitioner is not important to the general public because it has been decided in the affirmative on prior occasions. The Petitioner merely asks that this Court decide whether the Sixth Circuit accurately reviewed the evidence presented at trial to determine if the jury verdict conformed to the proofs. However, a Writ of Certiorari is an impermissible method for obtaining a review of the facts. The Supreme Court shall *not* grant a Writ of Certiorari to review judgments based predominantly on questions of fact. *N. L. R. B.* v. *Waterman's Steamship Corp.*, 309 U.S. 206, 60 S.Ct. 493, 84 L.Ed. 704, *reh. denied*, 309 U.S. 696, 60 S.Ct. 611, 84 L.Ed. 1036 (1940); it will *not* grant a writ to review evidence and discuss specific facts. *United States* v. *Johnson*, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1925).

The issue raised by the Petitioner may have been one of gravity or general importance when it was first presented in the annals of American jurisprudence; however, since this issue has been laid to rest by past decisions, it can only be concluded that the present Petition seeks a review of the evidence. This is not an appropriate reason for issuance of the Writ.

B. Damage Award Does Not Shock Conscience, Thus Does Not Meet Standard For Review.

The right to a jury trial in a federal court in a civil proceeding is guaranteed by the 7th Amendment of the United States Constitution. The measuring of damages and the amount awarded in an action for personal injuries rests with the discretion of the jury which has the opportunity to listen to the entire testimony, taking into account reasonable inferences and the credibility and demeanor of the witnesses. *Peirce* v. *Van Dusen*, 78 F. 693 (6th Cir., 1920).

Trial courts should be reluctant to interfere with a jury verdict unless the award is deemed excessive on the basis that it does not conform to the evidence. The question of excessiveness is one for the determination of the trial court in the first instance. In the case *sub judice*, the trial court took the opportunity to review the evidence and the jury award via the Petitioner's motion for J.N.O.V., and make the appropriate comparison. The trial court concluded that the award did not substantially exceed any rational appraisal or estimate of the damages.

To interfere with a jury award, the trial court must be convinced that it is so excessive as to shock the judicial conscience; that "the damages are so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous." 22 Am. Jur. 2d, *Damages*, § 1022, pp. 1069-1070. The factors considered when determining whether the jury award was "outrageous" are many and the trial court was in the best position to review the proofs because it had first-hand participation in their presentation. It cannot be said that there was *no* evidence to support the jury award, nor can it be stated with accuracy that the amount proved is *materially* less than the verdict re-

turned. 22 Am. Jur. 2d, *Damages*, § 1023, pp. 1070-1071. If this were the case, the District Court and the Sixth Circuit had the opportunity to overturn the verdict; they chose not to do so.

The District Court's refusal to grant a new trial or a judgment n.o.v. will not be disturbed on appeal unless an abuse of discretion is shown. *Goranson* v. *Kloeb*, 308 F.2d 655 (6th Cir., 1962). The Petitioner did not raise the issue of "abuse of discretion" with the Sixth Circuit and therefore waived the right to do so. The award should not be set aside merely because it is large or because the reviewing court would have awarded less.

The term "abuse of discretion" has been equated with the "clearly erroneous" standard employed in civil appeals, both from final judgments and appealable interlocutory orders. *See, Nicol* v. *Koscinski*, 188 F.2d 537, 538 (6th Cir., 1951). The District Court's decision not to interfere with the collective judgment of the jury (which heard all of the evidence) was not "clearly erroneous." At most, the District Court committed "harmless error."

Throughout its Petition, the Petitioner asks this Court to play a "dangerous game" by comparing damages rendered in other cases with those rendered by the jury in the case *sub judice*, even though the facts adduced at trial in such other cases may be completely different. 22 Am. Jur. 2d, *Damages*, § 1024, pp. 1071-1073. Such an approach is inherently suspect because there is no guarantee that the benchmark jury award, by which all subsequent jury awards must be compared, is accurate. Moreover, such rote comparison removes the need for a jury; merely submit the issues of damages to a computer program which accounts for all jury awards.

The facts, taken as a whole, justify the jury award. Taking into consideration the Respondent's earnings record as a seaman, and his work-life, the damage award was in line with the evidence. The best representation for future lost wages is the most recent year for earnings ($32,281.00). The Petitioner asserts that this is not the appropriate benchmark. The Petitioner itself asks this Court to engage in speculation by suggesting *extraneous* facts which were *not* presented at trial (Petition, p. 11; that Respondent returned to work on June 4, 1989, twenty months *after* the trial ended), or which were fortuitous occurrences which may, or may not, arise in the future (Petition, p. 11, n. 3; Respondent "may return to his native Yemen"). The facts disclose that Respondent had a sailing career which commenced twenty years ago. Moreover, the injury sustained aboard the Petitioner's vessel required repeated visits for proper medical care (Petitioner's Writ, p. 6; 57 times by one physician alone). The evidence presented by Respondent proved that he suffered from a deteriorating physical condition and that he was thereby permanently disabled from working as a seaman (Matta Deposition, pp. 39-41; Obianwu Deposition, pp. 9-11, 14-15, 39; Newman Deposition, pp. 14, 16-17, 24-26, 28-30, 34-42). The Petitioner did not present sufficient rebuttal evidence to prove otherwise. More specifically, the Petitioner did not present one shred of evidence which the jury could use to calculate a different award. The Petitioner simply failed in its burden of proving mitigated damages. *Jones* v. *Consolidated Rail Corp.*, 800 F.2d 590 (6th Cir., 1986). Respondent established that he sustained a permanent reduction in his earning capacity for the rest of his work-life. The age of 65 or 70 is not an outrageous prospect for one's work-life expectancy, irrespective of the conclusions reached by the *Statistical Abstract of the U.S.*, the "Holy Grail" upon which the Petitioner

places heavy reliance, but which it did *not* introduce into evidence. Many people work beyond the "average" age and the jury may recognize this fact. Moreover, the jury is cognizant of the infallibility of economists to predict the future with reasonable certainty. The jurors are acutely aware of the concept of inflation and the reality of rising wages and prices. The whole of their collective experience and knowledge produced a reasonable conclusion. It should not have been, and it was not, disturbed in the lower courts. It should not be disturbed now.

SUMMARY/CONCLUSION

The Petitioner seeks review without substantial justification. No new important issue of great general interest is presented; the issue that the Petitioner raises has already been decided by the judicial system. The lower courts in the case *sub judice* have decided that the jury award did, in fact, conform to the evidence presented at trial. The Petitioner itself seeks speculation to produce a result more favorable to its position; it desires to use the U.S. Supreme Court as the last arbiter of a fact dispute and mold it into a repository for non-constitutional and non-statutory construction. Such issues are best left to the general wisdom of the triers of fact, jury or judge, and to the learned wisdom of intermediate appellate review. The Sixth Circuit stated it best in its mandate (Petitioner's Writ, Appendix A-7):

> "This is a classic case of factual disputes which should have been, and were, submitted to a jury."

For the reasons presented herein, Respondent prays that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: September 20, 1989

APPENDICES TO BRIEF IN OPPOSITION

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APPENDIX A

RELEVANT STATUTORY PROVISIONS

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28 U.S.C. SECTION 1254

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. SECTION 1333

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as a prize.

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28 U.S.C. SECTION 1916

§ 1916. Seamen's suits

In all courts of the United States, seamen may institute and prosecute suits and appeals in their own names and for their own benefit for wages or salvage or the enforcement of laws enacted for their health or safety without prepaying fees or costs or furnishing security therefor.

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46 U.S.C. SECTION 688

§ 688. Recovery for injury to or death of seaman

(a) **Application of railway employee statutes; jurisdiction.** Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees

shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) **Limitation for certain aliens; applicability in lieu of other remedy.** (1) No action may be maintained under subsection (a) or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action, if the incident occurred —

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources — including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its terri-

tories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in Article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person —

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

APPENDIX B

SUPREME COURT RULE 17

Rule 17. Considerations governing review on certiorari

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2 The same general considerations outlined above will control in respect of petitions for writs of cer-

tiorari to review judgments of [1] the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

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[1] [*Printer's Note*: Footnote omitted in printing.]